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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Cross-Appellant, v. MANUEL MARIO RIVADENEYRA, Appellant/Cross-Appellee.	2 CA-CR 2007-0281 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20003446

Honorable Paul S. Banales, Judge Pro Tempore
Honorable Howard Hantman, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Manuel Rivadeneyra was convicted of one count of attempted second-degree murder, two counts of aggravated assault, and two counts of simple assault. On appeal, he argues the trial court erred by finding he had voluntarily absented himself from trial and by finding him competent to stand trial. He also contends he was prejudiced by the court's jury instruction on self-defense. On cross-appeal, the state argues the court erred by granting Rivadeneyra's motion for a new trial on the charge of attempted second-degree murder. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On October 10, 2000, Rivadeneyra had a verbal altercation with Regina, a classmate at a local community college, and her boyfriend, Paul, apparently over a video recording Rivadeneyra had previously made of Regina. After Paul asked to talk to Rivadeneyra after a class, Rivadeneyra sprayed pepper spray into Paul's eyes. Paul responded with his own pepper spray, and the two then engaged in a fist fight. After Rivadeneyra fell to the ground, Paul walked away. Rivadeneyra then pulled out a knife, ran at Paul, and stabbed him. When Regina came to Paul's assistance, Rivadeneyra stabbed her as well.

¶3 He was arrested and charged with two counts each of attempted first-degree murder, aggravated assault with a deadly weapon or dangerous instrument, and aggravated assault causing serious physical injury. Rivadeneyra was arraigned on November 1 and released after he posted the required $2,500 bond. The court set the case for trial starting

on April 24, 2001. Rivadeneyra failed to appear. The court found his absence to be voluntary and proceeded with the trial. After the state rested its case, the court granted its motion to dismiss the charge of attempted first-degree murder with respect to Regina. The jury acquitted Rivadeneyra of attempted first-degree murder of Paul but found him guilty of the lesser included offense of attempted second-degree murder. It also found him guilty of the two aggravated assault charges relating to Paul and the two lesser included offenses of simple assault committed against Regina.

¶4 Rivadeneyra was arrested on a warrant for these offenses five years later, in January 2006. His new defense counsel filed three motions: a motion for a mental examination pursuant to Rule 11.1, Ariz. R. Crim. P., to determine his competency for the resumption of proceedings, a motion for a similar examination to determine whether he had been competent at the time of trial in 2001 and a "hearing to determine whether his absence had in fact been voluntary,"[1] and a motion for a new trial and to vacate his conviction for attempted second-degree murder on the ground that this conviction was based on a nonexistent theory of liability.

¶5 After a mental examination, Rivadeneyra was found incompetent and sent to the Arizona State Hospital for treatment. Three months later, the court found he had been restored to competency. The court subsequently held hearings on the issue of Rivadeneyra's

[1]We note that the trial court apparently did not specifically order any examination to determine Rivadeneyra's competency to stand trial in April 2001. Instead, in concluding that Rivadeneyra's absence from trial had been voluntary, it relied exclusively on evidence presented at the hearings it convened for that purpose, including testimony from a psychiatrist who had treated Rivadeneyra in 2001.

mental condition at the time of trial and concluded his absence had been voluntary. It sentenced him to a presumptive, 10.25-year term of imprisonment for attempted second-degree murder; presumptive, concurrent terms of imprisonment of 7.5 years for each of the aggravated assault convictions; and to time served for the simple assault convictions. However, it then entertained Rivadeneyra's renewed motion for a new trial, vacated the murder conviction, and ordered a new trial on that count. This appeal followed.

Discussion

Competency/voluntary absence

¶6 First, Rivadeneyra argues the trial court erred in finding he voluntarily had absented himself from trial. A defendant's right to be present at trial is protected by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as article II, § 24 of the Arizona Constitution. *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998). However, a defendant may voluntarily relinquish this right. *Id.* ¶ 9. And, pursuant to Rule 9.1, Ariz. R. Crim. P., the trial court "may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, his right to be present at it, and received a warning that the proceeding would go forward in his absence should he . . . fail to appear." *See also State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983). But, "if the defendant provides subsequent information to overcome the inference . . . the trial court must consider that information." *State v. Reed*, 196 Ariz. 37, ¶ 4, 992 P.2d 1132, 1134 (App. 1999). However, "the burden falls on the defendant to show that his absence was involuntary." *Hall*, 136 Ariz. at 222, 665 P.2d at 104. And,

because a finding of voluntary absence "is basically a question of fact," *Brewer v. Raines*, 670 F.2d 117, 120 (9th Cir. 1982), we review the trial court's ruling for an abuse of discretion, *Hall*, 136 Ariz. at 223, 665 P.2d at 105.

¶7 Two Arizona cases are consistent with the trial court's finding that Rivadeneyra's absence had been voluntary. In *Reed*, the trial court found the defendant's absence on the second day of trial to be voluntary after "defense counsel did not provide the court with any information about [defendant's] absence and did not object to the resumption of the trial." 196 Ariz. 37, ¶ 4, 992 P.2d at 1134. The defendant subsequently filed a motion for a new trial, arguing that because his absence had been due to his hospitalization after a suicide attempt, it had been involuntary. *Id.* ¶ 2. At a hearing, two expert witnesses testified to his mental condition. *Id.* ¶ 4. One, a psychologist, stated the defendant was not competent to waive his right to be present. *Id.* The other, a psychiatrist, testified that although the defendant was depressed, he was able to understand the proceedings against him and had "made a rational decision to 'abort his trial by killing himself.'" *Id.* ¶¶ 4, 7. On appeal, we concluded the trial court "did not err in finding that his suicide attempt and consequent hospitalization constituted a voluntary waiver of his right to be present." *Id.* ¶ 7.

¶8 In *Hall*, the defendant told his counsel he had been ill two days before trial. 136 Ariz. at 222, 665 P.2d at 104. Counsel instructed the defendant to seek medical attention and to have the doctor contact counsel promptly so he could inform the court; however, he heard nothing further and the defendant did not appear at trial. *Id.* The trial

court found he had voluntarily absented himself and proceeded with the trial. *Id.* at 223, 665 P.2d at 105. After the defendant was subsequently arrested, the defendant argued he had "blacked out" for a ten-day period encompassing the trial dates, and thus his absence had been involuntary. *Id.* At a hearing, a psychologist testified that although the defendant had brain damage, it was more likely he had knowingly absented himself from trial. *Id.* The trial court reaffirmed its finding that the defendant's absence had been voluntary, and Division One of this court affirmed his convictions on appeal. *Id.*

¶9 Here, Rivadeneyra failed to appear at trial and defense counsel told the court he had not had recent contact with him. Finding his absence was voluntary, the court proceeded with the trial, noting he had been advised at his arraignment that trial might be set and held without him if he failed to appear at further proceedings.[2] After Rivadeneyra was arrested five years later, he filed a motion requesting a "hearing to determine whether his absence was in fact voluntary," arguing he had been "too ill to attend trial." The court held a hearing over three dates, considering testimony from Gaston Gomez Moreno, a psychiatrist who had treated Rivadeneyra in Mexico before and after the date of his trial. Rivadeneyra's sister, Eva Valencia, and his original defense counsel, Fernando Gaxiola, also testified.

[2]Although in the proceedings below Rivadeneyra challenged the court's finding that he had, in fact, received adequate notice of his right to be present at trial, he does not raise this argument on appeal. In any event, the records of Rivadeneyra's arraignment support the court's finding.

¶10 Moreno testified he began treating Rivadeneyra when he was hospitalized for twenty-four hours for a "panic crisis." Shortly thereafter, in January 2001, he prescribed an antidepressant and a sedative. Based on Rivadeneyra's responses to a psychometric test suggesting he was suffering from schizophrenia, Moreno subsequently added an antipsychotic medication. He also treated Rivadeneyra when he was admitted to a hospital emergency room for two hours on March 27, suffering from "tachycardia," or heart palpitations. He had no further contact with Rivadeneyra until July 3, when he observed that "there were significant improvements and his symptoms had diminished."

¶11 Moreno initially opined that Rivadeneyra could not "have testified in a courtroom between January and July of 2001," could not "have provided assistance to an attorney," and could not "have remained calm and stable to be able to understand complicated proceedings." However, he subsequently conceded that after Rivadeneyra had received his initial medications he was able to complete a written psychometric examination of 567 questions in January, over two sessions totaling five and a half hours; that "days or weeks" after receiving the antipsychotic medication he should have been "stable enough to come to trial and assist his counsel"; and that neither Rivadeneyra nor his family had indicated he needed any help in the period between his discharge from the hospital in March and his next consultation in July. Furthermore, Rivadeneyra had told Moreno in January that he was "very anxious and under great psychological pressure due to legal problems he was having in the United States," and specifically that "he had been in a fight . . . had a court

date, . . . [and] was afraid to go to court." In response, Moreno had advised him to return to the United States and "resolve those matters."

¶12 Rivadeneyra's sister confirmed that Rivadeneyra knew there were charges pending against him in the United States, but stated she and her family "were unable to bring him here . . . or convince him to present himself here." "[T]o present some sort of justification for his absence," she decided to bring a letter to Rivadeneyra's counsel on the first day of trial, "indicat[ing] that his mental state was such that he couldn't attend the trial." Although Gaxiola confirmed he had received the letter, he stated he had not brought it to the court's attention because he believed its content to be untrue based on a prior communication with Rivadeneyra. He was unable to elaborate at the hearing because of Rivadeneyra's invocation of the attorney-client privilege. However, Gaxiola further stated that he "had no basis" at trial for objecting to the court's finding that Rivadeneyra had voluntarily absented himself, and that if questioned, he "would have given the Court information that would have supported that finding."

¶13 The trial court concluded that Rivadeneyra had not sustained his burden of showing his absence had been involuntary. The court found

> the defendant's absence was in fact voluntary; that the defendant was not so psychotic, delusional, or bipolar to not be able to make a choice; that the defendant made a choice not to appear that was knowing and intentional; and . . . this was a decision the defendant made to avoid prosecution.

Based on the evidence before us, the court did not abuse its discretion.

¶14 In a closely related argument, Rivadeneyra also contends the court erred in implicitly finding he had been competent to stand trial. A defendant may not be tried while his mental condition renders him unable to understand the proceedings or assist in his own defense. Ariz. R. Crim. P. 11.1. The defendant, the prosecution, and the court all have a duty to ensure a defendant is not tried while incompetent. *State v. Starcevich*, 139 Ariz. 378, 389, 678 P.2d 959, 970 (App. 1983). And, "[a] mentally incompetent defendant cannot knowingly or intelligently waive his rights." *State v. Howland*, 134 Ariz. 541, 548-49, 658 P.2d 194, 201-02 (App. 1982).

¶15 However, the record in this case shows Rivadeneyra was clearly aware of the proceedings against him but made no attempt to raise the issue of his competence until he was arrested five years after trial. And in objecting to his trial counsel's failure to raise the issue, he improperly used the attorney-client privilege as a shield to block the court's inquiry.[3] *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 15, 154 P.3d 1046, 1052 (App. 2007) (defendant cannot use attorney-client privilege to block inquiry into issue he has raised). Moreover, the trial court had no grounds on which to contemporaneously order a competency hearing sua sponte, and thus it did not err in failing to do so. *See State v. Kemp*, 185 Ariz. 52, 67, 912 P.2d 1281, 1296 (1996).

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[3]To the extent Rivadeneyra argues Gaxiola acted unreasonably in failing to bring the content of Valencia's letter to the court's attention, he must pursue such an argument in a proceeding for post-conviction relief. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32[, Ariz. R. Crim. P.,] proceedings.").

¶16 Furthermore, as in *Howland*, "the record does not show that [Rivadeneyra] was incompetent to stand trial." 134 Ariz. at 551, 658 P.2d at 204. Although, like the trial courts in *Reed* and *Hall*, the court heard evidence that Rivadeneyra was mentally ill, such evidence is not dispositive. *See* Ariz. R. Crim. P. 11.1 ("presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial"); *State v. Evans*, 125 Ariz. 401, 403, 610 P.2d 35, 37 (1980) (defendant competent to stand trial notwithstanding diagnosis of paranoid schizophrenia). And, like those courts, it also heard evidence supporting a finding of competence. Thus, the court did not abuse its discretion in finding explicitly that Rivadeneyra had been competent to waive his right to be present, *see State v. Glassel*, 211 Ariz. 33, ¶ 27, 116 P.3d 1193, 1204 (2005), and implicitly, to stand trial, *cf. Howland*, 134 Ariz. at 548-49, 658 P.2d at 201-02 (mentally incompetent defendant cannot waive his rights).[4]

Self-defense instruction

¶17 Relying on *State v. Grannis*, 183 Ariz. 52, 60, 900 P.2d 1, 9 (1995), Rivadeneyra argues the trial court gave the jury an erroneous self-defense instruction. We review jury instructions de novo to determine whether they properly stated the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). Because Rivadeneyra did not

[4]To the extent Rivadeneyra objects to the lack of a specific finding that he was competent to stand trial, an argument he did not raise at trial and does not develop on appeal, we note that the absence of specific findings as to a defendant's competence is not reversible error where, as here, the record is adequate to support such a finding. *See Howland*, 134 Ariz. at 550-51, 658 P.2d at 203-04.

object to the instructions at trial, we review for fundamental error.[5] *See State v. Simpson*, 217 Ariz. 326, ¶ 12, 173 P.2d 1027, 1029 (App. 2007). Fundamental error is that which goes to the foundation of the case such that the defendant could not have received a fair trial. *State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶18 In *Grannis*, our supreme court noted that, pursuant to A.R.S. §§ 13-404 and 13-405, "*apparent* deadly force can be met with deadly force, so long as defendant's belief as to apparent deadly force is a reasonable one." 183 Ariz. at 60, 900 P.2d at 9. The court found that the trial court had erred in giving a self-defense instruction that included language suggesting "'[a] defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force'" because the instruction "suggested that only actual deadly force could justify defendant's deadly force." *Id.* at 61, 900 P.2d at 10.

¶19 Here, the instruction that was given stated as follows:

> Actual danger is not necessary to justify the use or threatened use of deadly physical force in self-defense. It is enough if a reasonable person in the defendant's situation would have believed that the use or threatened use of deadly force was immediately necessary to protect oneself under the

[5]We are not persuaded by Rivadeneyra's argument that the instruction amounted to structural error. As our supreme court has recognized, the only error in jury instructions that can amount to structural error is a defect in the reasonable doubt instruction, *State v. Torres*, 208 Ariz. 340, ¶ 11, 93 P.3d 1056, 1060 (2004), and there was no such defect here.

> circumstances. However, self-defense justifies the use or threatened use of deadly force only while the real or apparent danger exists. The right to use deadly physical force in self-defense ends when the real or apparent danger ends.
>
> That the defendant's belief was honest is immaterial. You must measure the defendant's belief against what a reasonable person would believe.

¶20 Rivadeneyra contends the use of the term "apparent danger" in the third and fourth sentences of the instruction was erroneous, arguing the court should have used the phrase "apparent deadly physical force" instead. However, contrary to Rivadeneyra's argument, "the court adequately instructed the jury that actual danger is not necessary to justify self-defense but only that there be danger as viewed through the eyes of a reasonable man in the defendant's situation." *State v. Barker*, 94 Ariz. 383, 389, 385 P.2d 516, 520 (1963). Furthermore, we cannot conceive of a situation in which a reasonable person apparently facing "deadly physical force" would not also believe he was facing "danger." The term used by the court is thus, if anything, a broader one than that suggested by Rivadeneyra. He was therefore not prejudiced by any error in the instruction, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607, as it "inured solely to [his] benefit," *see State v. Baumann*, 125 Ariz. 404, 412 n.8, 610 P.2d 38, 46 n.8 (1980).

Attempted second-degree murder instruction

¶21 On cross-appeal, the state argues the trial court erred in granting Rivadeneyra's motion for a new trial on the attempted second-degree murder charge on the ground the jury had been erroneously instructed it could find Rivadeneyra guilty on a recklessness theory.

We review the granting of a motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P., for an abuse of discretion. *State v. Meehan*, 139 Ariz. 20, 22, 676 P.2d 654, 656 (App. 1983). It is an abuse of discretion for a court to grant a new trial "on the basis of its erroneous conclusion as to the propriety of . . . [a jury] instruction," when "no mistake of law or fact occurred in the trial and . . . the evidence fully sustains the conviction." *State v. Anderson*, 102 Ariz. 295, 297, 428 P.2d 672, 674 (1967).

¶22 Here, based on his attack on Paul, the jury found Rivadeneyra guilty of attempted second-degree murder as a lesser included offense of attempted first-degree murder. However, the jury was erroneously instructed it could base its verdict on a recklessness theory. *See State v. Curry*, 187 Ariz. 623, 627, 931 P.2d 1133, 1137 (App. 1996). The state recognizes there is no offense of attempted reckless second-degree murder in Arizona and concedes the court erred in including recklessness as a culpable mental state. But it argues the jury could not have found Rivadeneyra guilty of attempted second-degree murder based on recklessness because it also found Rivadeneyra had "acted intentionally or knowingly in inflicting 'serious physical injury' on [Paul]." The state's analysis is flawed. "In order to commit an 'attempt' a defendant must have an intent to perform acts *and* to achieve a result which, if accomplished, would constitute the crime." *Id.* Thus, as Division One of this court stated in *State v. Ontiveros*, 206 Ariz. 539, ¶ 14, 81 P.3d 330, 333 (App. 2003), there can be "no offense of attempted second-degree murder based on knowing merely that one's conduct will cause serious physical injury. The offense of attempted

second-degree murder requires proof that the defendant intended or knew that his conduct would cause death." The trial court did not abuse its discretion in granting a new trial.

Disposition

¶23 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____

PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge